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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86471501
Applicant	Hayden Productions, LLC
Applied for Mark	HAYDEN PRODUCTIONS
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of Hayden Productions, LLC

Serial No. 86471501

Trademark: HAYDEN PRODUCTIONS

Filing Date: December 4, 2014

BRIEF OF THE APPLICANT

TABLE OF CONTENTS

	Page No.s
Table of Authorities.....	3
I. Introduction.....	4
II. Statement of the Case.....	4
III. Argument.....	6
IV. Conclusion.....	16

TABLE OF AUTHORITIES

CASES:

<i>Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank</i> , 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).....	7
<i>First Savings Bank F.S.B. v. First Bank System Inc.</i> , 101 F.3d at 645, 40 USPQ2d 1865, 1870 (10 th Cir. 1996).....	6
<i>General Mills, Inc. v. Kellogg Co.</i> , 824 F.2d 622, 3 USPQ2d 1442 (8th Cir. 1987).....	7
<i>Hewlett-Packard Co. v. Packard Press Inc.</i> , 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).....	7
<i>In re Decombe</i> , 9 USPQ2d 1812 (TTAB 1988).....	8
<i>In re Dixie Restaurants Inc.</i> , 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).....	6
<i>In re E.I. du Pont DeNemours & Co.</i> , 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973).....	6
<i>In re Pellerin Milnor Corp.</i> , 221 USPQ 558 (TTAB 1983).....	8
<i>In re Shell Oil Co.</i> , 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).....	7
<i>J & J Snack Foods Corp. v. McDonald's Corp.</i> , 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991).....	7
<i>Local Trademarks, Inc. v. Handy Boys Inc.</i> , 16 USPQ2d 1156 (TTAB 1990).....	7
<i>Luigino's Inc. v. Stouffer Corp.</i> , 50 USPQ2d 1047.....	7
<i>Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.</i> , 875 F.2d 1026, 10 USPQ2d 1961 (2d Cir. 1989).....	6
<i>Octocom Systems Inc. v. Houston Computer Services Inc.</i> , 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990).....	7
<i>Paula Payne Products Co. v. Johnson Publishing Co.</i> , 473 F.2d 901, 177 USPQ 76 (C.C.P.A. 1973).....	7
<i>Quartz Radiation Corp. v. Comm/Scope Co.</i> , 1 USPQ2d 1668 (TTAB 1986).....	8

<i>Shen Manufacturing Co. v. Ritz Hotel Ltd.</i> , 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004).....	7
---	---

<i>Universal Money Centers, Inc. v. American Tel. & Tel. Co.</i> , 22 F.3d 1527, 30 USPQ2d 1930 (10th Cir. 1994).....	6
--	---

OTHER AUTHORITIES:

TMEP § 1207.01(a)(i).....	8
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TMEP § 1207.01(a)(iii).....	7
-----------------------------	---


TMEP § 1207.01(d)(vii).....	8
-----------------------------	---

I. INTRODUCTION

COMES NOW the Applicant Hayden Productions, LLC (hereinafter “Applicant”) and through counsel The Trademark Company, PLLC, and provides this Brief of the Applicant in support of its appeal of the examining attorney’s refusal to register the instant mark.

II. STATEMENT OF THE CASE

On or about December 4, 2014 Applicant filed the instant trademark with the U.S. Patent and Trademark Office seeking to register the same on in connection with the following services: Entertainment services in the nature of arranging social entertainment events; Entertainment services in the nature of hosting social entertainment events; Entertainment services in the nature of live visual and audio performances by World Class Performing Artists, Corporate Professionals, LED, Circus performers, Living Decor, Hologram, Projection and 3D mapping along with models, dancers, magicians, Dj’s, staging, and fire performers; Entertainment services in the nature of organizing social entertainment events.

On or about March 26, 2015 the Examining Attorney refused registration of the Applicant’s trademark on the grounds that, if registered, it would create a likelihood of confusion with the registered trademark  more fully set forth in U.S. Registration No. 3515473.

On or about August 4, 2015 Applicant filed a response to the Office Action dated March 26, 2015 arguing in support of registration. However, ultimately Applicant’s argument was not deemed persuasive by the Examining Attorney and, accordingly, on or about November 6, 2015 the Examining Attorney made the refusal final.

The instant appeal now timely follows.

III. ARGUMENT

The Standard for a Determination of a Likelihood of Confusion

A determination of likelihood of confusion between marks is made on a case- specific basis. *In re Dixie Restaurants Inc.*, 41 USPQ2d 1531, 1533 (Fed . Cir. 1997). The Examining Attorney is to apply each of the applicable factors set out in *In re E.I. du Pont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). The relevant *du Pont* factors are:

- (1) The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression;
- (2) The similarity or dissimilarity and nature of the goods as described in an application or registration or in connection with which a prior mark is in use;
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels;
- (4) The conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing;
- (5) The number and nature of similar marks in use on similar services; and
- (6) The absence of actual confusion as between the marks and the length of time in which the marks have co-existed without actual confusion occurring.

Id.

The Examining Attorney is tasked with evaluating the overall impression created by the marks, rather than merely comparing individual features. *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1029, 10 USPQ2d 1961 (2d Cir. 1989). In this respect, the Examining Attorney must determine whether the total effect conveyed by the marks is confusingly similar, not simply whether the marks sound alike or look alike. *First Savings Bank F.S.B. v. First Bank System Inc.*, 101 F.3d at 645, 653, 40 USPQ2d 1865, 1870 (10th Cir. 1996) (recognizing that while the dominant portion of a mark is given greater weight, each mark still must be considered as a whole)(citing *Universal Money Centers, Inc. v. American Tel. & Tel. Co.*, 22 F.3d 1527, 1531,

30 USPQ2d 1930 (10th Cir. 1994)). Even the use of identical dominant words or terms does not automatically mean that two marks are confusingly similar. In *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627, 3 USPQ2d 1442 (8th Cir. 1987), the court held that “Oatmeal Raisin Crisp” and “Apple Raisin Crisp” are not confusingly similar as trademarks. Also, in *First Savings Bank F.S.B. v. First Bank System Inc.*, 101 F.3d at 645, 653, 40 USPQ2d 1865, 1874 (10th Cir. 1996), marks for “FirstBank” and for “First Bank Kansas” were found not to be confusingly similar. Further, in *Luigino’s Inc. v. Stouffer Corp.*, 50 USPQ2d 1047, the mark “Lean Cuisine” was not confusingly similar to “Michelina’s Lean ‘N Tasty” even though both marks use the word “Lean” and are in the same class of services, namely, low-fat frozen food.

Concerning the respective goods with which the marks are used, the nature and scope of a party’s goods must be determined on the basis of the goods recited in the application or registration. *See, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *J & J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computergoods Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973). *See generally* TMEP § 1207.01(a)(iii).

Even if the marks are similar, confusion is not likely to occur if the goods in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create an incorrect assumption that they originate from the same source. *See, e.g., Shen Manufacturing Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004) (cooking classes and kitchen textiles not related); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ2d

1156 (TTAB 1990) (LITTLE PLUMBER for liquid drain opener held not confusingly similar to LITTLE PLUMBER and design for advertising services, namely the formulation and preparation of advertising copy and literature in the plumbing field); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668 (TTAB 1986) (QR for coaxial cable held not confusingly similar to QR for various products (*e.g.*, lamps, tubes) related to the photocopying field). *See generally* TMEP § 1207.01(a)(i).

Purchasers who are sophisticated or knowledgeable in a particular field are not necessarily immune from source confusion. *See In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983). However, circumstances suggesting care in purchasing may tend to minimize likelihood of confusion. *See generally* TMEP § 1207.01(d)(vii).

Applying the legal standards as enumerated above, it is clear that confusion is not likely as between Applicant's trademark and the trademark cited and, accordingly, the refusal to register HAYDEN PRODUCTIONS should be withdrawn.

The Trademarks Are Dissimilar

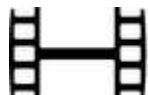
The points of comparison for a word mark are appearance, sound, meaning, and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (citing *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973)). Similarity of the marks in one respect – sight, sound, or meaning – will not automatically result in a determination that confusion is likely even if the goods are identical or closely related. Rather, taking into account all of the relevant facts of a particular case, similarity as to one factor alone *may* be sufficient to support a holding that the marks are confusingly similar, but a similarity of one factor is not

dispositive of the entire analysis. See *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988).

Additions or deletions to marks are often sufficient to avoid a likelihood of confusion if: (1) the marks in their entireties convey significantly different commercial impressions; or (2) the matter common to the marks is not likely to be perceived by purchasers as distinguishing source because it is merely descriptive or diluted.

If the respective trademarks create separate and distinct commercial impressions source confusion is not likely. *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1245, 73 USPQ2d 1350, 1356-57 (Fed. Cir. 2004) (reversing TTAB's holding that contemporaneous use of THE RITZ KIDS for clothing items (including gloves) and RITZ for various kitchen textiles (including barbeque mitts) is likely to cause confusion, because, *inter alia*, THE RITZ KIDS creates a different commercial impression).

In the instant case, Applicant's trademark HAYDEN PRODUCTIONS creates a commercial impression of a general production company under the name of HAYDEN without specific reference to that which is being produced. In the alternative, the stylized registered

trademark  **Haydenfilms.com** creates a very distinct commercial impression of a film company under the name of HAYDEN specifically identifying the type of goods or services used in connection with the trademark, namely films and matters in relation to films. A pictorial element further emphasizes this distinction as registrant's mark is specifically for a stylized format.

As such, given these separate and distinct commercial impressions, it is submitted that this fact favors a finding of an absence of a likelihood of confusion under this *du Pont Factor*.

Overlapping Terms Descriptive

Moreover, if the common element of two marks is “weak” in that it is generic, descriptive, or highly suggestive of the named goods or services, it is unlikely that consumers will be confused unless the overall combinations have other commonality. *See, e.g., In re Bed & Breakfast Registry*, 791 F.2d 157, 159 229 USPQ 818, 819 (Fed. Cir. 1986) (reversing TTAB’s holding that contemporaneous use of BED & BREAKFAST REGISTRY for making lodging reservations for others in private homes, and BED & BREAKFAST INTERNATIONAL for room booking agency services, is likely to cause confusion, because, inter alia, the descriptive nature of the shared wording weighed against a finding that the marks are confusingly similar); *U.S. Shoe Corp. v. Chapman*, 229 USPQ 74 (TTAB 1985) (holding COBBLER’S OUTLET for shoes, and CALIFORNIA COBBLERS (in typed and stylized forms) for footwear and women’s shoes, not likely to cause confusion); *In re Istituto Sieroterapico E Vaccinogeno, Toscano “SCLAVO” S.p.A.*, 226 USPQ 1035 (TTAB 1985) (holding ASO QUANTUM (stylized, with “ASO” disclaimed) for diagnostic laboratory reagents, and QUANTUM I for laboratory instruments for analyzing body fluids, not likely to cause confusion).

See also Safer, Inc. v. OMS Invs., Inc., 94 USPQ2d 1031, 1044-45 (TTAB 2010) (holding DEER-B-GON for animal repellant used to repel deer, other ruminant animals, and rabbits, and DEER AWAY and DEER AWAY PROFESSIONAL for repellant for repelling deer, other big game, and rabbits, not likely to cause confusion, noting that “DEER” is descriptive as applied to the relevant goods and thus has no source-indicating significance); *Bass Pro Trademarks, L.L.C. v. Sportsman’s Warehouse, Inc.*, 89 USPQ2d 1844, 1857-58 (TTAB 2008) (finding that, although cancellation petitioner’s and respondent’s marks were similar by virtue of the shared descriptive wording “SPORTSMAN’S WAREHOUSE,” this similarity was outweighed by differences in

terms of sound, appearance, connotation, and commercial impression created by other matter and stylization in the respective marks); *In re Shawnee Milling Co.*, 225 USPQ 747, 749 (TTAB 1985) (holding GOLDEN CRUST for flour, and ADOLPH’S GOLD’N CRUST and design (with “GOLD’N CRUST” disclaimed) for coating and seasoning for food items, not likely to cause confusion, noting that, because “GOLDEN CRUST” and “GOLD’N CRUST” are highly suggestive as applied to the respective goods, the addition of “ADOLPH’S” is sufficient to distinguish the marks); *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 1356, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (affirming TTAB’s holding that contemporaneous use of applicant’s CAPITAL CITY BANK marks for banking and financial services, and opposer’s CITIBANK marks for banking and financial services, is not likely cause confusion, based, in part, on findings that the phrase “City Bank” is frequently used in the banking industry and that “CAPITAL” is the dominant element of applicant’s marks, which gives the marks a geographic connotation as well as a look and sound distinct from opposer’s marks); *In re S.D. Fabrics, Inc.*, 223 USPQ 54, 55-56 (TTAB 1984) (holding DESIGNERS/FABRIC (stylized) for retail fabric store services, and DAN RIVER DESIGNER FABRICS and design for textile fabrics, not likely to cause confusion, noting that, because of the descriptive nature of “DESIGNERS/FABRIC” and “DESIGNER FABRICS,” the addition of “DAN RIVER” is sufficient to avoid a likelihood of confusion).

In the instant case, the trademarks at issue share the same, weak, overlapping term(s), namely HAYDEN. It is respectfully requested that the Board take judicial notice that HAYDEN is, accordingly to HowManyofMe.com, a commonly occurring surname in the United States occurring roughly 43,120 occurrences of the same.

As the case law sets forth above, if the primary similarity as between the Applicant's Trademark and that of the registrant are descriptive in nature, and this case the primary overlapping element is weak given its surname significance, this consideration must also lend to a conclusion of an absence of a likelihood of confusion under *du Pont*.

Distinctions as Between Applicant's and Registrant's Goods and Services

The nature and scope the goods or services offered in connection with the Applicant's and the registrant's trademarks must be determined on the basis of the goods or services identified in the application or registration. *See, e.g., Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1370, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 1463, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991); *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 sF.2d 1490, 1493, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); *Paula Payne Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (CCPA 1973); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1500 (TTAB 2010).

The issue is not whether the goods and/or services will be confused with each other, but rather whether the public will be confused as to their source. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000).

If the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption

that they originate from the same source, then, even if the marks are identical, confusion is not likely. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1371, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012) (affirming the Board’s dismissal of opposer’s likelihood-of-confusion claim, noting “there is nothing in the record to suggest that a purchaser of test preparation materials who also purchases a luxury handbag would consider the goods to emanate from the same source” though both were offered under the COACH mark); *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1244-45, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004) (reversing TTAB’s holding that contemporaneous use of RITZ for cooking and wine selection classes and RITZ for kitchen textiles is likely to cause confusion, because the relatedness of the respective goods and services was not supported by substantial evidence); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ2d 1156, 1158 (TTAB 1990) (finding liquid drain opener and advertising services in the plumbing field to be such different goods and services that confusion as to their source is unlikely even if they are offered under the same marks); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668, 1669 (TTAB 1986) (holding QR for coaxial cable and QR for various apparatus used in connection with photocopying, drafting, and blueprint machines not likely to cause confusion because of the differences between the parties’ respective goods in terms of their nature and purpose, how they are promoted, and who they are purchased by).

The facts in each case vary and the weight to be given each relevant *du Pont* factor may be different in light of the varying circumstances; therefore, there can be no rule that certain goods or services are *per se* related, such that there must be a likelihood of confusion from the use of similar marks in relation thereto. *See, e.g., In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (regarding alcoholic beverages); *Info. Res. Inc. v. X*Press Info. Servs.*, 6 USPQ2d 1034, 1038 (TTAB 1988) (regarding computer hardware and software); *Hi-Country Foods Corp.*

v. Hi Country Beef Jerky, 4 USPQ2d 1169, 1171–72 (TTAB 1987) (regarding food products); *In re Quadram Corp.*, 228 USPQ 863, 865 (TTAB 1985) (regarding computer hardware and software); *In re British Bulldog, Ltd.*, 224 USPQ 854, 855-56 (TTAB 1984) (regarding clothing); *see also M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 1383, 78 USPQ2d 1944, 1947–48 (Fed. Cir. 2006) (noting that relatedness between software-related goods may not be presumed merely because the goods are delivered in the same media format and that, instead, a subject-matter-based mode of analysis is appropriate).

In the instant matter, Applicant provides the following identification in the subject application:

“Entertainment services in the nature of arranging social entertainment events; entertainment services in the nature of hosting social entertainment events; entertainment services in the nature of live visual and audio performances by world class performing artists, corporate professionals, led, circus performers, living decor, hologram, projection and 3d mapping along with models, dancers, magicians, DJ's, staging, and fire performers; entertainment services in the nature of organizing social entertainment events.”

To the contrary, the registered trademark provides the following:

“[E]ntertainment services, namely, organizing and conducting online and live film festivals and exhibitions; providing on-line information regarding films, and providing information on film industry events in the nature of film festivals, and exhibiting non-downloadable films via a global computer network; planning and conducting live award shows for the purpose of providing recognition by the way of live awards to demonstrate excellence in the field of films; planning and conducting film screening events in the nature of planning and conducting film festivals that screen contemporary movies, documentaries and short films; planning and conducting cultural events, exhibitions, conferences and panel discussions in the fields of art, literature, music, and cinema.”

Within this context, these differ insofar as Applicant's services concern the arrangement of social events whereas registrant's services are specifically and narrowly defined in the film industry thus removing any overlap as between the services of the Applicant and the registrant.

As such, and in consideration of these distinctions, it is respectfully submitted that the instant *du Pont* factor favors registration of the applied-for trademark.

Absence of Actual Confusion

Finally, there is no evidence of record indicating that there has been actual confusion in the marketplace as between Applicant's services and the registrant's services.

The absence of any instances of actual confusion is a meaningful factor where the record indicates that, for a significant period of time, an applicant's sales and advertising activities have been so appreciable and continuous that, if confusion were likely to happen, any actual incidents thereof would be expected to have occurred and would have come to the attention of one or all affected trademark owners. *See Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992).

As the Examining Attorney has alleged, the Office believes that the Applicant's services and those of the registered trademark travel in similar trade channels and are marketed in a similar enough manner to create a likelihood of confusion. While not conceding this point, provided that this is, in fact, the Office's position it would be contradictory to discount the absence of actual confusion as between the trademarks at issue where the Office contends there is an overlap in marketing and trade channels.

Accordingly, consistency in the Office's position, whether or not countered by the Applicant in the instant Argument, suggests that the Office should consider the absence of evidence of actual confusion for a period of more than five (5) years of co-existence in the marketplace to be a meaningful factor in the instant analysis, a factor which clearly supports registration of Applicant's Trademark under this *du Pont* factor.

CONCLUSION

Based upon the foregoing it is submitted that the *du Pont* factors addressed herein favor registration of the Applicant's Trademark.

WHEREFORE it is respectfully requested that the Trademark Trial and Appeal Board reverse the decision of the Examining Attorney, remove as an impediment the cited trademark, and approve the instant Application for publication.

Respectfully submitted this 27th day of June, 2016,

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